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A NORTH CAROLINA PREVIEW OF THE REVISED (1990) ARTICLE 3 OF THE UNIFORM COMMERCIAL CODE

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I. Introduction

Our present Article 3, found deep within Chapter 25 of the North Carolina General Statutes, was formed from the fabric of the Uniform Negotiable Instruments Law (NIL). Promulgated in 1896 by the National Conference of Commissioners on Uniform State Laws (NCCUSL) and adopted in all states by 1924, the NIL was based on the developed case law at that time in America and the English Bills of Exchange Act which was enacted by Parliament in 1882.¹

Although the NIL was extraordinarily successful as a uniform law, it and other contemporaneous uniform laws began to show a need for revision as early as the late 1930's.² By the 1940's, the NCCUSL and the American Law Institute (ALI) were working together to revise and modernize the NIL and the other areas of commercial law that would together emerge in the 1950's as the

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2. See J. WHITE AND R. SUMMERS, UNIFORM COMMERCIAL CODE, 3 (3d ed. 1988); Llewellyn, Why We Need the Uniform Commercial Code, 10 U. FLA. L. REV. 367 (1957); See also N.C. GEN. STAT. § 25-3-101 Official Comment (1986).
Uniform Commercial Code (UCC).\(^3\)

The revised NIL became Article 3 of the UCC. Entitled "Commercial Paper," it has been a part of the North Carolina General Statutes since its adoption in 1965 along with the other articles, one through eleven, making up North Carolina's present UCC.\(^4\)

During the twenty-six years of its existence in North Carolina, Article 3 has not been litigated extensively. Indeed, judging by the annotations in the General Statutes, the majority of negotiable instrument cases have been decided under the NIL and not under Article 3. Such little litigation should perhaps be expected from an area of the law that for years has been considered fairly well settled, as indicated by its early codification as the NIL and adoption by all states and its subsequent revision and adoption by all states as Article 3 of the UCC.

The small amount of litigation on Article 3 in North Carolina does not, however, mean that no problems have surfaced in Article 3 on a national level or that the passage of time, with its changing commercial practices and technologies, has not affected Article 3. In explaining the need for a revision of Article 3, the NCCUSL and the ALI state that the basic reason for a revision is the accumulation of decisions based upon Article 3.\(^6\) Some of these decisions, they assert, have identified problems which now need to be corrected in statutory language.\(^6\) Also, they point out that banks and other institutions, primarily as a result of new technology, operate differently than they did when the UCC was first promulgated, particularly with regard to processing checks.\(^7\) In addition, they add that changing business practices, such as allowing savings and loans, credit unions and other brokerage houses to offer accounts upon which checks and other payment orders can be drawn, also call for Article 3 to address those changes.\(^8\) Finally, they cite the need to rid Article 3 of unnecessary technical and archaic language,

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4. With the adoption of changes in Article 8 and Article 9 required by the General Assembly's recent passage of the Business Corporation Act, North Carolina now has the 1977 Official Text of the Uniform Commercial Code.
5. See "Uniform Commercial Code Article 3 - Negotiable Instruments - A Summary" and "Why States Should Adopt Revised Articles 3 and 4 of the UCC," in information package distributed by the Uniform Law Commissioners.
6. See supra note 5.
7. Id.
8. See "Why States Should Adopt Revised Articles 3 and 4 of the UCC," in information package distributed by the Uniform Law Commissioners.
to reorganize the material in a more logical sequence, and to resolve areas of current non-uniformity among the states. In short, it is asserted that Article 3 has aged like its predecessor, the NIL, and is now in need of revision and modernization.

As a result, the NCCUSL and the ALI began work on a revision and modernization of Article 3 several years ago and in 1990 finished work on a proposed revised Article 3. The time has now come for the states to examine the revised article for possible adoption.

Although any complete consideration of Article 3 for adoption will no doubt include an examination of the revised Article 4, this article will concentrate only on revised Article 3, which of the two revised articles is more extensively revised. In addition, this article is not intended to be a detailed examination of the revised Article 3. Since the revised Article 3 completely replaces the present Article 3, a detailed examination of revised Article 3 must focus on each section of the revised article in the light of its predecessor section in the present article, as well as examine those sections which the revised article has omitted and those which it has added. To complete such an examination would take far more time than is available with this article's deadline and more space than the LAW REVIEW can reasonably provide for this one article.

As its title suggests, this article is intended merely as a preview of revised Article 3. It will begin with some overall comments about revised Article 3, specifically about the extent and significance of the revision. It then will discuss specific examples from revised Article 3 to illustrate how the revision affects present Article 3 and how it furthers the goals of the NCCUSL and the ALI. It will also include references to present North Carolina case law or statutory law that may be affected by the revision. If this preview

9. See supra note 8.
11. A revised Article 4 was also proposed by the NCCUSL and the ALI in 1990. Both present Article 4 and revised Article 4 are entitled “Bank Deposits and Collections.”
12. See “Conforming and Miscellaneous Amendments to Uniform Commercial Code Article 4” in the NCCUSL and the ALI’s information packet. It explains that a full revision of Article 4 was delayed because of the Federal Reserve Board’s announcement in 1990 that it was contemplating the assumption of regulatory control over forward collection of checks and that it might also extend other regulatory controls over bank deposits and collections.
conveys to the BAR at least a taste of what the revision of Article 3 is about, the purpose of this article will be fulfilled.

II. THE REVISION IN GENERAL

The easiest assessment to make about revised Article 3 is that it is a complete and thorough revision. If one perhaps hoped that the NCCUSL and the ALI would merely take present Article 3 and make changes here and there in its now familiar code sections, cursory glance at the language of revised Article 3 will dash that hope. What is being proposed is not an amended version of the present Article 3 as the NCCUSL and the ALI did with the 1972 version of Article 9, but a completely revised Article 3. The familiar sections of present Article 3 are completely rewritten, leaving only bits and pieces of the original language. Although the familiar numbering system is retained, that is, the 3-100's through 3-600's, the section numbers in the revised article do not necessarily correspond to the section numbers of the same or similar sections in present Article 3. Indeed, the subsections in any one section of present Article 3 may have been scattered into several different revised Article 3 sections, and the subsections from several different present Article 3 sections may have been combined into one revised Article 3 section. In fact, so many sections of present Article 3 have been either omitted or changed to a completely different numbered section that revised Article 3 comes with a "Table of Disposition of Sections in Former [i.e., the present] Article 3," (Table of Disposition) so that one can more easily figure out what has happened to a specific section in present Article 3. However, although the seven part organization of the sections in present Article 3 is reduced to five parts in revised Article 3, those five parts which remain in the

13. The 1972 version of Article 9 of the UCC, adopted in North Carolina in 1975, took this path, that is, amending the provisions of the 1962 Code with additional language here and less language there, without any major rewriting of Article 9's provisions.

14. The § 3-700's, concerning advice of international sight drafts, and the § 3-800's, on miscellaneous matters, are both eliminated in revised Article 3.

15. Part 1, Short Title, Form and Interpretation; Part 2, Negotiation, Transfer and Indorsement; Part 3, Rights of a Holder; Part 4, Liability of Parties; Part 5, Presentment, Notice of Dishonor and Protest; Part 6, Discharge; Part 7, Advice of International Sight Draft; Part 8, Miscellaneous.

16. Part 1, General Provisions and Definitions; Part 2, Negotiation, Transfer, and Indorsement; Part 3, Enforcement of Instruments; Part 4, Liability of Parties; Part 5, Dishonor; Part 6, Discharge and Payment.

http://scholarship.law.campbell.edu/clr/vol13/iss3/2
revised article are essentially the same as the original five parts which they replace.

The Official Comments to present Article 3 are, of course, gone, but, fortunately, they are replaced in revised Article 3 by fairly extensive and generally quite helpful new Official Comments which frequently give examples for illustrative purposes and references to prior statutory provisions in present Article 3. The Official Comments in revised Article 3, however, do not contain the very helpful and convenient sections setting out prior uniform statutory provisions, cross references, and definitional cross references, all of which are contained in the Official Comments of present Article 3.

Such general comments about Article 3’s revision can do little in conveying its actual extent and significance. To get a better grasp on the revision of Article 3, assume that a lawyer represents the payee of a check which has been dishonored by the drawee bank because of insufficient funds. Once the decision has been made to sue the drawer of the check, the lawyer might check the present applicable law by looking at N.C. Gen. Stat. § 25-3-413, entitled “Contract of maker, drawer and acceptor” and located in present Article 3’s Part 4, which is aptly labeled, “Liability of the Parties.” Subsection (2) of N.C. Gen. Stat. § 25-3-413 sets out the contract of a drawer on a check as follows: “The drawer engages that upon dishonor of the draft and any necessary notice of dishonor or protest he will pay the amount of the draft to the holder or to any indorser who takes it up. The drawer may disclaim this liability by drawing without recourse”.

Under present Article 3, the drawer’s contract is a contract of secondary liability because the drawer need pay only after dishonor and after any necessary notice of dishonor or protest has been given. Indeed, the lawyer should probably check to be certain that dishonor has indeed occurred and that any necessary notice of dishonor or protest has been given because of the possibility of discharge resulting from an untimely presentment or an untimely notice of dishonor or protest.

Under revised Article 3, the lawyer who knows about N.C.
GEN. STAT. § 25-3-413(2) in present Article 3 cannot assume that the section number 3-413 will take him to the comparable section in revised Article 3. Indeed, revised section 3-413 is entitled “Obligation of Acceptee” and relates to the acceptor’s contract presently found in N.C. GEN. STAT. § 25-3-413(1), but it has nothing to do with the drawer’s contract. In this case, the lawyer must consult the Table of Disposition which shows that N.C. GEN. STAT. § 25-3-413(2) is now found in revised subsections 3-414(b) and (e).23

Revised section 3-414 is indeed labeled, “Obligation of Drawer,” which seems applicable to the drawer’s contract, but it appears quite extensive when compared to N.C. GEN. STAT. § 25-3-314(2). In contrast with the two sentences of N.C. GEN. STAT. § 25-3-314(2), revised section 3-414 has six separate subsections!

A quick reading of revised subsection 3-414(e) reveals that it relates to the second sentence of N.C. GEN. STAT. § 25-3-314(2) concerning drawing without recourse. Therefore, the lawyer will conclude that revised subsection 3-414(b) and not (e) must relate to the drawer’s contract set out in the first sentence of N.C. GEN. STAT. § 25-3-413(2).

The language of revised subsection 3-414(b), however, has little resemblance to the first sentence of N.C. GEN. STAT. § 25-3-413(2). It provides as follows:

If an unaccepted draft is dishonored, the drawer is obliged to pay the draft (i) according to its terms at the time it was issued or, if not issued, at the time it first came into possession of a holder, or (ii) if the drawer signed an incomplete instrument, according to its terms when completed, to the extent stated in Sections 3-115 and 3-407. The obligation is owed to a person entitled to enforce the draft or to an indorser who paid the draft under Section 3-415.24

Fortunately, the Official Comment to revised section 3-414 does confirm that this subsection (b) replaces former subsection 3-413(2).25

23. The same table shows that N.C. GEN. STAT. § 25-3-413(1) is now in two different sections, revised section 3-412 for the old maker’s contract and revised subsection 3-413(a) for the acceptor’s contract. The table also shows that N.C. GEN. STAT. § 25-3-413(3), applying to an acceptance that varies the terms of the draft and the resulting discharge, is omitted. Instead of using the Table of Disposition, the lawyer could have looked to Part 4 of revised Article 4, entitled “Liability of Parties,” exactly as it is in present Article 4, and then used the headings of the sections to get to revised section 3-414.


Now that subsection 3-414(b) in revised Article 3 has definitively been identified as the counterpart of N.C. GEN. STAT. § 25-3-314(2), the lawyer must consider the significance of the differences between the two. For example, N.C. GEN. STAT. § 25-3-413(2) uses the term “draft” while revised subsection 3-414(a) uses the term “unaccepted draft.” Since revised subsection 3-414(b) uses a different term, the lawyer must face the question whether that different term has a different meaning. Hopefully, the lawyer knows that the draft referred to in N.C. GEN. STAT. § 25-3-413(2) has not been accepted under N.C. GEN. STAT. § 25-3-410(1) in the sense that the drawee bank has not certified it under N.C. GEN. STAT. § 25-3-411(1). A quick check of the Table of Disposition will then give some assurance that the terms are really the same. N.C. GEN. STAT. § 25-3-410(1) is now under revised Article 3 subsection 3-409(a), and N.C. GEN. STAT. § 25-3-411(1) is now revised subsection 3-409(d). Revised section 3-409 is entitled, “Acceptance of Draft; Certified Check,” and its subsections (a) and (d) readily confirm that the term “unaccepted draft” of revised Article 3 is indeed the same as the “draft” of present Article 3; both apply to the uncertified, personal check.

Yet another uncertainty appears in revised subsection 3-414(b). Although there is a reference to dishonor as in N.C. GEN. STAT. § 25-3-413(2), any mention of giving notice of dishonor or protest has disappeared in the revised subsection. Fortunately again, the Official Comment explains that the former requirement of giving notice of dishonor or protest has been eliminated. 26 Indeed, the comment adds that the liability of the drawer of an unaccepted draft is now treated as a primary liability rather than a secondary liability. 27

Although revised subsection 3-414(b) and the Official Comment confirm that no notice of dishonor or protest need be given under revised Article 3, the lawyer must again consider the significance of that change. The easy conclusion is that it merely eliminates two steps that the lawyer no longer need worry about or prove in a suit against the drawer. The Official Comment to revised section 3-503, entitled, “Notice of Dishonor,” confirms this

26. U.C.C. § 3-414, Official Comment 2 (1990). The comment also states that notice of dishonor is necessary only with respect to the indorser’s liability under revised Article 3.

27. Id. The comment adds that the term “secondary party” is not used in revised Article 3.
conclusion about notice of dishonor by stating, "They [the draw-ers] are entitled to have the instrument presented to the drawee and dishonored . . . before they are liable to pay, but no notice of dishonor need be made to them as a condition of liability."\(^{28}\) The Official Comment to revised section 3-505, entitled, "Evidence of Dishonor," confirms the same conclusion about protest by stating, Protest is no longer mandatory and must be requested by the holder. Even if requested, protest is not a condition to the liability of indorsers or drawers.\(^{29}\)

Another significance relating to the elimination of notice of dishonor has to do with discharge resulting from an untimely no-tice of dishonor. The Official Comment to revised section 3-503 states rather obscuresly that "...[t]here is no reason why drawers should be discharged on instruments they draw until payment or acceptance."\(^{30}\) This reference is certainly made concerning the ef-fect of N.C. GEN. STAT. § 25-3-502(1)(b) which, upon an untimely notice of dishonor by the holder\(^{31}\) and loss of funds by the drawer resulting from drawee bank's insolvency occurring during the delay in giving notice, allows the drawer to discharge his liability by written assignment to the holder of his rights against the drawee bank. Regardless of the policy decision not to allow the drawer to dis-charge his liability in such a situation, revised Article 3's elimina-tion of the requirement of giving notice of dishonor surely elimi-nates the possibility of any discharge of the drawer as a result of an untimely notice of dishonor!

Although revised Article 3 eliminates the necessity of giving notice of dishonor, other North Carolina statutory provisions may actually bring it back. For example, N.C. GEN. STAT. § 6-21.3, entitled "Remedies for returned check," provides that a drawer who fails to pay a non-sufficient fund check in cash to the payee within thirty (30) days of "written demand," shall be liable for the amount of the check and, in addition, for damages of the lesser of five hundred dollars or three times the amount of the check, but in no case less than one hundred dollars. Thus, to the extent the at-torney wants damages, he must essentially give a notice of dishonor to the drawer.\(^{32}\)

\(^{29}\) U.C.C. § 3-505, Official Comment (1990).
\(^{31}\) N.C. GEN. STAT. § 25-3-508(2) (1986).
\(^{32}\) N.C. GEN. STAT. § 6-21.3 (1986) sets out exactly what must appear in the "written demand."
A similar type of notice may be desired in a criminal action for a worthless check under N.C. GEN. STAT. § 14-107. N.C. GEN. STAT. § 14.107.1 describes a procedure for establishing a prima facie case under N.C. GEN. STAT. § 14-107, and part of that procedure includes the sending of a letter by certified mail to the check passer.83 Thus, again, what is essentially a notice of dishonor, may need to be sent, despite its elimination under revised Article 3.

Another obvious difference between N.C. GEN. STAT. § 25-3-413(2) and revised subsection 3-414(b) has to do with what the drawer agrees to do. Under N.C. GEN. STAT. § 25-3-413(2), the drawer agrees to pay “the amount of the draft to the holder or to any indorser who takes it up.” Revised subsection 3-414(b) states that the drawer will pay the draft in either of two situations, neither of which seems particularly similar to N.C. GEN. STAT. § 25-3-413(2).

In the first of the two situations under revised subsection 3-414(b), the drawer agrees to pay the unaccepted draft according to its terms at the time it is issued or, if not issued, at the time it first comes into possession of a holder.84 The word “issue,” defined in present article 3 as “the first delivery of an instrument to a holder or a remitter,”35 and the phrase “not issued” will certainly raise some concern in the lawyer’s mind. Unlike present Article 3, revised Article 3 does not include as a part of its Official Comments any definitional cross reference section. Like present Article 3, however, revised Article 3 does provide in its revised section 3-103 a list of words defined or used in the article, with references to appropriate sections. In that list is the word “issue” with a reference to revised section 3-105, entitled “Issue of Instrument.”

Revised subsection 3-105(a) defines issue similarly, although somewhat more broadly than present Article 3. It states that issue “means the first delivery of an instrument by the maker or drawer, whether to a holder or nonholder, for the purpose of giving rights on the instrument to any person.”36 Revised subsection 3-105(b) then provides that an unissued instrument, or an unissued incomplete instrument that is completed, is binding on the maker or drawer, but nonissuance is a defense. This subsection 3-105(b) and its Official Comment then suggest that the reference in revised sec-

tion 3-414(b) to an instrument "not issued," means an instrument, either completed or not, which the drawer has not yet delivered, but which has somehow gotten in the hands of a holder. Thus, revised section 3-414(b), in this first situation, seems merely to describe in considerable detail the amount that a drawer must pay and does not describe an agreement significantly different from the drawer's contract of N.C. Gen. Stat. § 25-3-413(2).

In the second situation under revised subsection 3-414(a), if the drawer signs an incomplete instrument, the drawer agrees to pay the unaccepted draft according to its terms when complete, to the extent stated in revised sections 3-115, dealing with incomplete instruments, and 3-407, dealing with alteration. Although this situation may seem different from the drawer's contract under N.C. Gen. Stat. § 25-3-413(2), which makes no reference at all to incomplete instruments or alterations, the drawer's contract under N.C. Gen. Stat. § 257-413(2) is subject to present Article 3's rules on incomplete instruments under N.C. Gen. Stat. § 25-3-115 and N.C. Gen. Stat. § 25-3-407. Indeed, revised Article 3 simply makes clear by reference to revised sections 3-115 and 3-407 what is generally the law under the present Article 3.

The last sentence in revised subsection 3-414(b) states who can enforce the obligation. According to that section, that person is "a person entitled to enforce the draft" or "an indorser who paid the draft under Section 3-415." A quick look at revised section 3-415, entitled "Obligation of the Indorser," reveals that this indorser is probably the same as "any indorser who takes it up" under N.C. Gen. Stat. § 25-3-413(2). The harder question is the identity of "a person entitled to enforce the draft." Under present Article 3, a holder would obviously be entitled to enforce an instrument, and N.C. Gen. Stat. § 25-3-301 so provides. A look at the Table of Disposition shows, however, that present Article 3's section 3-301 has been omitted. Fortunately, the Table of Disposition includes a comment to "see Comment to 3-301," and that comment states that revised section 3-301 "replaces former Section 3-301 that stated the rights of a holder." Indeed, revised section

3-301 is entitled, "Person Entitled to Enforce Instruments," and it includes, among three categories of persons who can enforce an instrument, "the holder of the instrument." Thus, although "a person entitled to enforce the draft" is broader than N.C. GEN. STAT. § 25-3-413(2)’s holder, it certainly includes the holder as a person who can sue.

The last sentence of N.C. GEN. STAT. § 25-3-413(2) provides that the drawer may disclaim the drawer’s liability by drawing without recourse. Revised subsection 3-414(e) contains this same rule, but it applies only to drafts that are not checks. Without noting this change in the law, the Official Comment provides as explanation that “[t]here is no legitimate purpose served by issuing a check on which nobody is liable.”

Despite the extensive rewriting of N.C. GEN. STAT. § 25-3-413(2) by revised Article 3, the major difference for the holder suing on the drawer’s contract under revised Article 3’s subsection 3-414(b) is that he does not have to give notice of dishonor or protest, and therefore the drawer of the check can not discharge his liability because of an untimely notice of dishonor or protest. However, the discussion so far has taken care of only two out of six subsections on the drawer’s contract in revised section 3-414. The lawyer in our example should, of course, examine those other subdivisions to be sure that they in no way adversely affect the suit on the drawer’s contract.

Revised section 3’s first subsection, (a), states the obvious, reinforced by the Official Comment, that this section does not apply to a drawer of a cashier’s check or other drafts drawn on the drawer. That obligation is covered by revised Section 3-412.

Two of the remaining three subdivisions bring together provisions which apply to the drawer’s contract, but which are scattered throughout present Article 3. For example, subsection (c) of revised section 3-414 provides for the effect of acceptance on the drawer’s contract, a subject covered presently in N.C. GEN. STAT. § 25-3-411(1). As noted by the Official Comment, revised section 3-414(c) changes the rule in N.C. GEN. STAT. § 25-3-411(1) since a discharge results under N.C. GEN STAT. § 25-3-411(1) only when a

42. U.C.C. § 3-301(i) (1990).
43. U.C.C. § 3-104(f) defines a check as a draft, other than a documentary draft, payable on demand and drawn on a bank or a cashier’s check or teller’s check.
holder procures the certification; under revised section 3-414(c), the drawer is discharged regardless of by whom acceptance was obtained.\textsuperscript{46} In addition, revised section 3-414(c) applies to all drafts and is not limited to checks as is N.C. GEN. STAT. § 25-3-411(1).

Subsection (f) of revised section 3-414 actually pulls from two provisions in present Article 3 and places them together to show the effect of an untimely presentment on the drawer’s contract. This subdivision takes from N.C. GEN. STAT. § 25-3-503(2)(a) a 30 day rule for timely presentment against a drawer of an uncertified check\textsuperscript{47} and puts it together with the effect of an untimely presentment from N.C. GEN. STAT. § 25-3-502(1)(b)\textsuperscript{48} so that a drawer under revised Article 3 may after 30 days discharge his liability by an assignment of his rights against the drawee when the drawee suspends payment after the 30 day period and the drawer is deprived of funds as a result. Except for present Article 3’s use of the 30 day period for a timely presentment as a presumption on an uncertified check rather than the hard and fast time period of 30 days for an unaccepted draft under revised Article 3, the difference between the two articles on this provision is not significant.

Finally, subsection (d) of revised section 3-414 handles the situation when a draft is accepted and the acceptor is not a bank, a subject not covered by the present Article 3.\textsuperscript{49} In contrast to the resulting discharge of the drawer’s contract under revised subsection 3-414(c) when acceptance is by a bank, subsection (d) provides that the drawer’s obligation to pay becomes the same as the obligation of an indorser if the draft is dishonored by the acceptor. In other words, the drawer’s contract in this case is secondary, subject just like the indorser’s contract, to the giving of notice of dishonor and discharge if the notice of dishonor is untimely.\textsuperscript{50}

None of these last four subsections really affects the lawyer’s use of the drawer’s contract in the suit against the drawer. Indeed,

\textsuperscript{46} U.C.C. § 3-414, Official Comment 3 (1990).

\textsuperscript{47} N.C. GEN. STAT. § 25-3-503(2)(a) (1986). The thirty (30) days rule from present Article 3 is, however, only a presumption of a reasonable period for presentment; revised Article 3 does not continue the use of the presumption.

\textsuperscript{48} N.C. GEN. STAT. § 25-3-502(1)(b) (1986).

\textsuperscript{49} If revised Article 3 contained in its Official Comments a section noting prior uniform statutory provisions, it would be far easier and quicker to determine that present Article 3 contains no similar section. The author bases this statement on his prior knowledge of present Article 3 and a quick look in reverse (under the column for revised sections) at the Table of Disposition.

\textsuperscript{50} U.C.C. § 3-414, Official Comment 4 (1990).
even with the conclusion reached above with respect to revised subsection 3-414(b), the lawyer may correctly conclude that, at least in a suit against the drawer on the drawer’s contract, the revision of Article 3 makes very little difference. However, any lawyer knowledgeable about present Article 3 will realize, perhaps painfully, that the revision of Article 3, as extensive as it is, will in the future claim a significant portion of his time in locating appropriate code sections, reading and studying them, and considering how any changes may or may not affect his actions in a case involving negotiable instruments.

III. The Scope of Revised Article 3

Revised subsection 3-102(a) states simply that revised Article 3 applies to Negotiable Instruments, which is not very surprising since the revised article is entitled “Negotiable Instruments.” Contrasting the revised article’s scope with that of present Article 3, the Official Comment to revised section 3-102 states that present Article 3 has no similar provision affirmatively stating its scope.\(^5\)

Indeed, N.C. GEN. STAT. § 25-3-103 merely states to what it does not apply,\(^6\) and then N.C. GEN. STAT. § 25-3-104(1) states the familiar requirements for a writing to be a negotiable instrument, one of which is that it must contain order or bearer language. Subsequently, in its very last section, present Article 3 sets out one fairly broad exception to the requirement that a negotiable instrument must contain order\(^7\) or bearer\(^8\) language. N.C. GEN. STAT. § 25-3-805 provides that article 3 also applies to any instrument whose terms do not preclude transfer and which is otherwise negotiable within Article 3 except that it is not payable to order or to bearer. The only difference between a writing within present Article 3 by virtue of N.C. GEN. STAT. § 25-3-805’s exception and one that fully qualifies under N.C. GEN. STAT. § 25-3-104(1) is that the holder of the writing under N.C. GEN. STAT. § 25-3-805 cannot be a holder in due course. Thus, a writing complying in every way with N.C GEN. STAT. § 25-3-104(1), except that it is neither payable to bearer or order, is still within the scope of present Article 3, except that no holder of it can be a holder in due course.

Revised Article 3 subtly changes the scope of present Article

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52. Money, documents of title, and investment securities.
3's coverage. Just like present Article 3, revised Article 3 requires that a negotiable instrument within its scope must contain order or bearer language.\[^{55}\] but as the Official Comment to revised section 3-104 explains, "...[t]here is no provision in revised Article 3 that is comparable to former Section 3-805."\[^{56}\] Although revised Article 3 does away with present Article 3's exception by omitting N.C. Gen. Stat. §25-3-805, it thereafter provides for an exception of its own. Revised Article 3's exception, however, is considerably narrower than that of present Article 3.

Revised Article 3's exception is set out conveniently in subsection (c) of revised section 3-104; it is not relegated to the end of the article as is N.C. Gen. Stat. §25-3-805 in the present Article 3. Revised section 3-104(c) provides that if an order \[^{57}\] meets all the requirements for negotiability except that it is not payable to order or bearer \[^{58}\] and it falls within the definition of a check, \[^{59}\] then it is a negotiable instrument. Thus a check remains a negotiable instrument even if it is not payable to order or bearer as long as it otherwise complies with the revised Article 3's requirements of negotiability.

The significance of this result is that revised Article 3's rules, including its provisions on holder in due course status, still apply to such a check. N.C. Gen. Stat. §25-3-805, which creates a broad exception, allows present Article 3 to cover both promises and orders, even if they are not payable to order or bearer, but takes away the benefits of holder in due course status. In contrast, revised section 3-104(c) creates a narrow exception covering only orders that are checks, even if they are not payable to order or bearer, but still extending to those checks all the benefits of revised Article 3, including those flowing from holder in due course status. Of course, any other promise or order that is not payable to order or bearer is not a negotiable instrument and is thus not covered by revised Article 3's rules, even if they otherwise meet revised Article 3's requirements of negotiability.

58. I.e., it meets the requirements of revised §3-104(a)(2) and (3).
59. I.e., it fails under revised § 3-104(a)(1) requiring that the order be payable to order or bearer.
60. U.C.C. § 3-104(f) (1990).
The Official Comments to revised section 3-104 set out the reasons for this change in scope of revised Article 3. Although acknowledging that words making a promise or order payable to order or bearer are the most distinguishing feature of a negotiable instrument, the comments state that the exception to the rule carved out for checks by revised section 3-104(c) is based on the belief that it is good policy to treat checks, which are payment instruments, as negotiable instruments whether or not they contain the words order or bearer.61 As suggested by the comments, the absence of order or bearer language can easily be overlooked and should not therefore affect the rights of holders who may pay money or give credit for a check without being aware that it is not in the conventional form.62

Other drafts and all promises are, of course, excluded from coverage of revised Article 3 if they do not contain order or bearer language. The Official Comments state that this "total exclusion" serves a useful purpose by providing a simple device to clearly exclude a writing that does not fit the pattern of typical negotiable instruments and which is not intended to be a negotiable instrument.63 If the rule were otherwise, assert the comments, disputes could conceivably arise over the negotiability of contracts for the sale of goods or services or for the sale or lease of real property because they contain a promise to pay money.64 A strict rule of total exclusion, except for checks, would therefore preclude any argument that such contracts might be negotiable instruments.

The North Carolina courts are quite aware of N.C. GEN. STAT. § 25-3-805. For example, in Old S. Life Ins. Co. v. Bank of N. C.,65 a certificate of deposit did not contain the requisite "order or bearer" language, but it was apparently otherwise a negotiable instrument under N.C. GEN. STAT. § 25-3-104(1). The North Carolina Court of Appeals used N.C. GEN. STAT. § 25-3-805 as a justification for applying present Article 3's rules in N.C. GEN. STAT. § 25-3-307(1) and (2) relating to the admission of signatures and the recovery of a judgment on an instrument. Revised Article 3's rules would, of course, not apply to the certificate of deposit in this case because it did not contain order or bearer language and it was not

62. Id.
63. Id.
64. Id.
a check within the only exception to revised Article 3's rule of total exclusion.

In First Fed. Sav. & Loan Ass'n of New Bern v. Branch Banking & Trust Co.,66 the North Carolina Supreme Court had before it a draft drawn by The Hanover Insurance Company on itself and payable through Chase Manhattan Bank. The court noted that the draft was not a negotiable instrument because it was payable without the addition of the words "or order" or any similar words of negotiability. Nevertheless, the court, citing N.C. GEN. STAT. § 25-3-805, held that present Article 3 applied, except that the holder of the draft could not be a holder in due course. The court then concluded that the rights of the parties were to be determined as if the draft were a negotiable instrument and thereafter proceeded to apply numerous sections from present Article 3. Again, revised Article 3's rules would not apply to the draft in this case because it did not contain order or bearer language and, although it was a draft, it was not a check within revised subsection 3-104(f).67

Although it appears that revised Article 3's limited scope would change the result in the two cases discussed, it is still possible to argue that revised Article 3 might still allow the results decided by the North Carolina courts. The Official Comments state that nothing in revised sections 3-104 or 3-102 is intended to mean that a court could not in a particular case involving a writing similar to a negotiable instrument treat that writing in a similar manner as if the writing were a negotiable instrument.68 As an example, the comments suggest that an obligor might be precluded from asserting a defense against a bona fide purchaser based on estoppel or ordinary principles of contract.69 Also, the comments suggest that the immediate parties to an order or promise that is not an instrument may provide by agreement that one or more of the provisions of Article 3 determine their rights and obligations.70 Finally, the comments suggest that a court could apply one or more


67. Official Comment 4 to Revised § 3-104 confirms this result by stating, "[A] draft drawn on an insurance company payable through a bank is not a check because it is not drawn on a bank." In addition, this draft was payable by Chase Manhattan not on demand, as is necessary for a check, but upon acceptance by The Hanover Insurance Company.


69. Id.

70. Id.
provisions of revised Article 3 to a writing by analogy.71 Certainly, a good argument could be made based on this last suggestion of the comments to achieve the same results under revised Article 3 in these two cases as those of the North Carolina courts did under present Article 3.

IV. THE VARIABLE INTEREST RATE NOTE

When present Article 3 was being drafted, variable rate interest notes were not common, and the drafters probably did not even consider whether a variable rate interest note should be included within the scope of present Article 3. Of course, N.C. GEN. STAT. § 25-3-104(1)(b) requires that any writing to be negotiable within present Article 3 must contain a "sum certain," certainly suggesting the possibility that such notes would not be negotiable. N.C. GEN. STAT. § 25-3-106 attempts to provide some certainty as to when a sum payable is a sum certain, but it provides little help in getting at what a sum certain really is. Fortunately, the Official Comment to that section does provide the following test for a sum certain:

"The computation [of the sum certain] must be one which can be made from the instrument itself without reference to any outside source, and this section does not make negotiable a note payable with interest 'at the current rate.'"72 Such a test on its face would seem to prevent any variable interest rate note from being negotiable because variable interest rates are usually pegged to some external standard such as the prime rate or a treasury bill rate, which are obviously outside sources condemned by the test of the Official Comment for N.C. GEN. STAT. § 25-3-106.

If double digit inflation had not come to the nation's economy in the early 1970's and showed some signs of continued fluctuation in later years, the issue may not have been raised, but the variable rate interest note became quite common as a result, and the issue naturally arose as to whether such notes were covered by Article 3's rules on negotiable instruments. Despite some argument to the contrary, the consensus after several years of legal comment73 and

71. Id. The Official Comment to N.C. GEN. STAT. § 25-3-805 (1986) also suggests that Article 3 might be applied to a non-negotiable instrument by analogy.


73. See, e.g., Darr, The Negotiability of Variable Interest Notes, 33 St. Louis U.L.J. 103 (1988); Dubner, Variable Interest Rates - Their Effect on Negotiability Under the UCC, 93 COM. L. J. 1 (1988); Hiller, Negotiability and Varia-
litigation was that such variable interest rate notes could not be negotiable under present Article 3. In response, demands were made to amend the UCC to bring variable interest rate notes within present Article 3, and some states went so far as to amend their own codes to make the variable rate interest notes negotiable. Thus, it is hardly surprising that the most hoped for change to be brought about by the revised Article 3 is the amendment of present Article 3's sum certain requirement to include variable rate interest notes as negotiable instruments.

Revised Article 3 sets out its requirements for negotiability in the same numbered section, 3-104, as does present Article 3. However, present Article 3's familiar term "sum certain" is dropped in the revised Article 3, and in its place is the term "a fixed amount" followed by the phrase "with or without interest or other charges described in the promise or order." The Official Comment mentions the above language and then makes reference to revised section 3-112(b) on interest. That revised section, 3-112, is entitled "Interest," and in its subsection (b) states that

"Interest may be stated in an instrument as a fixed or variable amount of money or it may be expressed as a fixed or variable rate or rates. The amount or rate of interest may be stated or described in the instrument in any manner and may require reference to information not contained in the instrument. . . ."

The obvious intention of the above provision is to bring the variable rate interest note within revised Article 3. Indeed, the Official Comment to section 3-112 states that the term "fixed amount" in revised section 3-104 applies only to principal; thus,
the interest of a note need not be a "fixed" amount. In addition, the same comment states that "...[i]f a variable rate of interest is prescribed, the amount of interest is ascertainable by reference to the formula or index described or referred to in the instrument."

V. FTC HOLDER IN DUE COURSE REGULATIONS

In May of 1976, the Federal Trade Commission’s (FTC) Holder in Due Course Regulations became effective. This rule provides in general that it is an unfair or deceptive act or practice as defined in Section 5 of the Federal Trade Commission Act for a seller, who is in the business of selling goods or services to consumers, to take a consumer credit contract or the proceeds of a purchase money loan unless the consumer credit contract taken by the seller or made in connection with the purchase money loan contains a provision in at least ten point, bold face language providing that the holder of the consumer credit contract takes subject to all claims and defenses which the debtor could assert against the seller.

The policy behind these regulations, at least as far as Article 3’s negotiable instrument is concerned, is to prevent a consumer buyer from falling victim to what is known as the holder in due

81. Id.
82. The most recent version of this regulation is 16 C.F.R. §§ 433.1-.3 (1990).
84. Seller is defined as “A person who, in the ordinary course of business, sells or leases goods or services to consumers.” 16 C.F.R. §433.1(j) (1990).
85. Consumer is defined as “A natural person who seeks or acquires goods or services for personal, family, or household use.” 16 C.F.R. § 433.1(b) (1990).
86. A “consumer credit contract” is defined as “Any instrument which evidences or embodies a debt arising from a ‘Purchase Money Loan’ transaction or a ‘financed sale’ as defined in paragraphs (d) and (e).” 16 C.F.R. § 433.1(i) (1990). Paragraph (d) defines “purchase money loan”; see note 84 infra. Paragraph (e) defines “financing a sale” as “extending credit to a consumer in connection with a ‘Credit Sale’ within the meaning of the Truth in Lending Act and Regulation Z.” 16 C.F.R. § 433.1(e).
87. Purchase money loan is defined as “A cash advance which is received by a consumer in return for a ‘Finance Charge’ within the meaning of the Truth in Lending Act and Regulation Z, which is applied, in whole or substantial part, to a purchase of goods or services from a seller who (1) refers consumers to the creditor or (2) is affiliated with the creditor by common control, contract, or business arrangement.” 16 C.F.R. § 433.1(d) (1990).
88. i.e., the buyer of the goods or services.
89. 16 C.F.R. §433.2(a),(b) (1990). See also a similar requirement in North Carolina’s Retail Installment Sales Act, N.C. GEN. STAT. § 25A-25 (1986).
course doctrine. In the classic example of that doctrine at work, the seller sells goods or services to a consumer and takes in payment for them a negotiable promissory note by which the consumer agrees to pay for the goods in installments over time. The seller then sells the note to a third party who takes it by proper negotiation, as well as for value, in good faith, and without notice that it is overdue, or has been dishonored, or of any defense against or claim to it. Unfortunately, the consumer subsequently discovers some defect in the goods or services. His immediate reaction is to withhold further payment on the promissory note and assert the defect as a defense when and if the seller sues for the amount still owed on the note. The seller, of course, received his money when he sold the note to the third party and is out of the transaction, leaving the consumer to contend with the third party who now expects payment. The consumer's refusal to pay the installments due on the promissory note instigates a suit by the third party against the consumer for the full amount of the note. When the consumer asserts in defense the defective goods or services, the third party claims holder in due course status, entitling him to take free of the consumer's personal defense of defective goods or services. The consumer is then forced to pay the full amount of the note to the third party, and his only recourse is to hire a lawyer and begin a suit for damages against the seller.

Under the FTC's Holder in Due Course Regulations, the result is quite different. In order to avoid the sanctions that may be imposed by the FTC, the seller should add the previously mentioned ten point, bold face language, and the third party in the above example will then take the promissory note subject to the consumer's defense. In other words, the third party can still sue the consumer for the full amount of the promissory note, but the consumer can counterclaim for damages resulting from the defective goods or services. In short, the FTC's language allows the consumer to assert against the third party the defenses that he has against the seller, in direct contravention of the UCC's holder in due course doctrine.

The effect of the FTC's language has apparently never been in

doubt, but exactly how or why it works has been the subject of
debate.\textsuperscript{95} Apparently the most popular view is that the FTC lan-
guage works with state law to make payment of the promissory
note conditional.\textsuperscript{96} In other words, if payment of the promissory
note is indeed subject to claims and defenses of the debtor (con-
sumer) as a result of the FTC language, then payment is certainly
conditional on the assertion of claims and defenses. If payment of
the promissory note is conditional, present Article 3 makes it non-
negotiable.\textsuperscript{97} If the promissory note is non-negotiable, then under
present Article 3 the third party can not be a holder in due course
who must take an "instrument," defined under the present Article
3 as a "negotiable instrument,"\textsuperscript{98} in order to become a holder in
due course.\textsuperscript{99} If the third party is not a holder in due course, then
under state law, i.e., the Uniform Commercial Code, he takes sub-
ject to the claims and defenses of the consumer,\textsuperscript{100} the exact result
expected by the FTC.

Unfortunately, such an explanation, based on the non-negotia-
bility of the promissory note, has other consequences which are not
quite so felicitous.\textsuperscript{101} If the FTC language does indeed make the
promissory note non-negotiable, the other rules in present Article
3, which apply only to negotiable instruments,\textsuperscript{102} no longer apply,
and the promissory note, now made non-negotiable and banned
from Article 3 by the FTC language, is then thrown back in with
ordinary contracts and controlled by common law contracts. No
longer is it governed by the certainty that Article 3, and its prede-
cessor, the NIL, gave to negotiable instruments.\textsuperscript{103}

It is, of course, questionable whether the FTC intended for the
ten point, bold face language to do far more than just abolish the
effect of the holder in due course doctrine, and there are other the-
ories of how the FTC language could accomplish the abolition of

\textsuperscript{95} Sturley, \textit{The Legal Impact of the Federal Trade Commission’s Holder
in Due Course Notice on a Negotiable Instrument: How Clever are the Rascals

\textsuperscript{96} \textit{Id.} at 957; \textit{see also} White and Summers, \textit{Uniform Commercial Code}, 3d

\textsuperscript{97} N.C. \textit{Gen. Stat.} \textsection 25-3-104(1)(b), 25-3-105 (1986).

\textsuperscript{98} N.C. \textit{Gen. Stat.} \textsection 3-102(e) (1986).


\textsuperscript{100} N.C. \textit{Gen. Stat.} \textsection 25-3-306 (1986).

\textsuperscript{101} Sturley, \textit{supra} note 95.

\textsuperscript{102} One exception not applicable here is N.C. \textit{Gen. Stat.} \textsection 25-3-805 (1986).

\textsuperscript{103} For a discussion of the practical consequences of not being able to apply
Article 3, \textit{see} Sturley, \textit{supra} n.95, at 958-60.
the holder in due course doctrine without taking away the negotiability of the promissory note, but revised Article 3 now puts the controversy to rest in revised section 3-106, which is entitled, "Unconditional Promise or Order." This section expands on revised Article 3's requirement, carried over from present Article 3, that a negotiable instrument's promise or order must be unconditional. Subsection (d) of revised Section 3-106 provides that if a promise or order contains a statement, required by applicable statutory or administrative law, to the effect that the rights of a holder or transferee are subject to claims or defenses that the issuer could assert against the original payee, the promise or order is not by that statement made conditional, but there cannot be a holder in due course of the instrument. Thus, the revised Article 3 retains control over a promissory note in which the FTC language has been inserted so that it remains a negotiable instrument, but the desired effect of the FTC language remains since the holder of such a promise or order cannot be a holder in due course and take free of the consumer's personal defenses.

VI. THE STATUTE OF LIMITATIONS

Present Article 3 has no provision setting out the statute of limitations for negotiable instruments. It does have N.C. GEN. STAT. § 25-3-122 which provides when a cause of action accrues for the maker or acceptor on a time or a demand instrument, when it accrues against the obligor of a demand or time certificate of deposit, and when it accrues against a drawer of a draft or an indorser of any instrument. Although the Official Comment to N.C. GEN. STAT. § 25-3-122 confines itself to comments on the terms of accrual of actions and makes only a passing reference to the statute of limitations, the North Carolina Comment specifically states the connection between N.C. GEN. STAT. § 25-3-122 and the statute of limitations. According to that comment, the terms of accrual in N.C. GEN. STAT. § 25-3-122 "are intended to state the time at which the period of limitations begins to run in favor of the

104. Sturley, supra note 95.
106. N.C. GEN. STAT. § 25-3-112(1)(a),(b) (1986).
108. N.C. GEN. STAT. § 25-3-112(3) (1986).
various parties." Thus, under Article 3 as it presently exists in North Carolina, the appropriate period for the statute of limitation may be determined only by looking to N.C. GEN. STAT. § 25-3-122 to determine when the cause of action accrues on a particular negotiable instrument and then by looking to some other section in the General Statutes for the length of time over which the statute of limitation runs. In short, present Article 3, by N.C. GEN. STAT. § 25-3-122, states the beginning point for the running of the statute of limitations, but it does not say how long it runs.

As an example, consider the statute of limitation against the maker of a negotiable promissory note that is payable on a certain day, such as April 1. N.C. GEN. STAT. § 25-3-122(1)(a) states that a cause of action against the maker of that note will accrue on the day after maturity, i.e., April 2. Under present Article 3 then, the statute of limitations will begin to run on April 2. Some other statute within the General Statutes must next provide how long the statute of limitations will run.

N.C. GEN. STAT. § 1-47(2), one of numerous statutes of limitations in Chapter 1 of the General Statutes, provides a ten year statute of limitation "...[u]pon a sealed instrument against the principal thereto." To an attorney not versed in the lore of the ancient seal and its effect on a contract, this provision might not seem applicable to a promissory note, but a fast look at the annotations following N.C. GEN. STAT. § 25-3-122 reveals that it does indeed apply to a negotiable promissory note under seal. Assuming the note is indeed "under seal," then N.C. GEN. STAT. § 1-47


111. Chapter 1 of the North Carolina General Statutes, particularly Article 5, entitled "Limitations, Other than Real Property," is a good place to begin looking in this particular case, but every attorney should be warned that statutes of limitation are scattered throughout the General Statutes.


and N.C. GEN. STAT. § 25-3-122(1) together indicate that the statute of limitations on the promissory note as against the maker is 10 years from April 2. If the promissory note is not under seal, then N.C. GEN. STAT. § 1-52(1) applies, together with N.C. GEN. STAT. § 25-3-122, so that the statute of limitations is only three years against the maker, starting again as of the day after maturity. A seal in North Carolina still makes a large difference!

In revised Article 3, present N.C. GEN. STAT. § 25-3-122 is shown on the Table of Disposition as omitted, but there is a notation to “See Comment 1 to 3-118”. That section, 3-118, is entitled, “Statute of Limitations,” and its comment114 begins by stating that revised section 3-118 differs from former section 3-122 because it does not define when a cause of action accrues. Accrual of a cause of action, it reports, is stated in other sections of Article 3, “such as those that state the various obligations of the parties to an instrument.”115

If this comment is taken seriously, however, and some of those sections that “state the various obligations of the parties to an instrument,” are examined, no specific reference will be found to accrual of actions. For example, revised section 3-412, entitled “Obligation of Issuer of Note or Cashier’s Check,” merely states that the issuer of a note is obliged to pay it according to its terms. No significant change is made in this revised section from the statement of the same obligation in N.C. GEN. STAT. § 25-3-413(1), and no specific mention is made of accrual of action as in N.C. GEN. STAT. § 25-3-122.

Revised section 3-502, entitled “Dishonor,” however, probably answers the question about accrual of an action. It states in subsection (a)(3) that the note is dishonored if it is not paid on the day it becomes payable.116 Thus, if the note is not paid on April 1, it is dishonored and the cause of action against the maker obviously accrues, beginning the next day.

Accrual of a cause of action, however, is no longer central to the statute of limitations for negotiable instruments under revised Article 3. In explaining this change, the Comment to revised section 3-118 merely states that revised section 3-118 differs from for-

116. Revised subsection 3-503(a)(3) applies only when subsections (a)(1) and (a)(2) do not apply. Subsection (a)(1) applies if the note is payable on demand, and subsection (a)(2) applies when the note is payable at or through a bank or the terms of the note require presentment.
mer section 3-122, that accrual of a cause of action can be found elsewhere, and that the purpose of revised section 3-118 is "to define the time within which an action to enforce an obligation, duty, or right arising under Article 3 must be commenced." These comments are, of course, a round-about way of saying that revised Article 3 now has its own, self-contained statute of limitations set out now in revised section 3-118. Under revised Article 3, the North Carolina attorney will no longer look outside Chapter 25 of the General Statutes for the length of time covered by the statute of limitations. Indeed, revised section 3-118 does the whole job now by defining, as previously mentioned, "the time within which an action to enforce an obligation, duty or right arising under Article 3 must be commenced." Revised section 3-118 will certainly make some changes in the statute of limitations of negotiable instruments in North Carolina, but at least the changes made are now set out clearly within revised Article 3, and only one statute, rather than two, has to be consulted. For example, an action against a maker on a negotiable promissory note payable at a definite time, whether it is under seal or not, must under revised section 3-118 be commenced within six years after the due date or dates stated in the note. As mentioned above, under present N.C. GEN. STAT. § 25-3-122, the statute of limitations on the same note would begin to run the day after maturity and under N.C. GEN. STAT. § 1-47(2) would cover the span of 10 years if under seal, but only three years under N.C. GEN. STAT. § 1-52(1) if it was not under seal. Thus, not only would the statute of limitations be changed by revised section 3-118, but the seal's effect on the statute of limitations for negotiable instruments would also be eliminated.

VII. THE FULL PAYMENT CHECK

Most lawyers and certainly even many laypeople are familiar with the "full payment check" and the common law rule that has made its use so popular. A full payment check is loosely described as a check marked with some indication that it is tendered

120. This check is also sometimes called a full settlement check or a full satisfaction check.
in full payment of a disputed claim.\textsuperscript{121} The common law rule, of course, provides that an accord and satisfaction is established when a payee cashes the check tendered in full payment of a disputed claim.\textsuperscript{122} The rule applies even though the payee tries to reserve his rights to sue by striking out the full payment language on the check before he cashes it.\textsuperscript{123}

Present Article 3 says nothing about a full payment check.\textsuperscript{124} Article 1 does, however, contain section 1-207, which allows a party to explicitly reserve his rights (by such words as "without prejudice" or "under protest") and then to perform in any manner demanded or offered without prejudicing the rights reserved. Some courts have interpreted section 1-207 as covering the full payment check.\textsuperscript{125} Indeed, by the payee's writing "without prejudice" or "under protest" on the full payment check, those courts have held that section 1-207 has changed the common law rule so that accord and satisfaction will not occur, and the payee of the check can then cash it and still sue for the balance claimed.\textsuperscript{126}

Although it appeared briefly that the North Carolina Court of Appeals might follow this new interpretation of section 1-207 and thus change the common law rule as it related to the full payment check,\textsuperscript{127} it has steadfastly refused to hold that section 1-207 of

\textsuperscript{121} Barber v. White, 46 N.C. App. 110, 264 S.E.2d 385 (1980).
\textsuperscript{122} Id. See also Restatement of Contracts § 281, comment d (1986).
\textsuperscript{123} See, e.g., Sharpe v. Nationwide Mutual Fire Ins. Co., 62 N.C. App. 564, 302 S.E.2d 893 (1983), cert. denied, 309 N.C. 823, 310 S.E.2d 353 (1983) (cashing of check tendered in full payment of a disputed claim established an accord and satisfaction regardless of an extensive disclaimer placed on the check); Brown v. Coastal Truckways, Inc., 44 N.C. App 454, 261 S.E.2d 266 (1980) (although defendant put the words "account in full" in the lower left hand corner of the check, plaintiff struck those words out before he deposited it and even notified the defendant that he was reserving his rights; common law rule was nevertheless applied to establish accord and satisfaction). See also Restatement of Contracts § 281, comment d (1986).
\textsuperscript{124} Article 3 in its drafting stages contained a section, later withdrawn, which specifically covered full payment checks. See Brown v. Coastal Truckways, Inc., 44 N.C. App 454, 261 S.E.2d 266 (1980); Rosenthal, Discord and Dissatisfaction: Section 1-207 of the Uniform Commercial Code, 78 Colum. L. J. 48 (1978).
\textsuperscript{125} See White and Summers, Uniform Commercial Code, 3d ed. § 13-24 and cases cited in that section. See also Rosenthal, supra note 124.
present Article 1 applies to the full payment check.\textsuperscript{128} Thus, the law of the full payment check in North Carolina is still based on the common law rule and is therefore reflected in numerous North Carolina cases.\textsuperscript{129}

Revised Article 3, unlike present Article 3, does explicitly cover the full payment check.\textsuperscript{130} Entitled "Accord and Satisfaction by Use of Instrument," revised section 3-311 incorporates the common law rule of the full payment check with some minor variations.\textsuperscript{131} The policy given for bringing the full payment check within revised Article 3 is that the common law rule produces a fair result and that informal dispute resolution by full satisfaction checks should be encouraged.\textsuperscript{132}

In brief, revised section 3-311's rule works to discharge a claim if the person against whom a claim is asserted can prove the four elements of the rule: (1) that the instrument or an accompanying written communication contained a conspicuous statement that the instrument was tendered as full satisfaction of the claim,\textsuperscript{133} (2) that the person does in good faith tender an instrument to a claimant as full satisfaction of the claim,\textsuperscript{134} (3) that the amount of the


\textsuperscript{130} As part of the revision of Article 3, present section 1-207 is amended by adding to subsection (2) a provision stating that section 1-207 does not apply to accord and satisfaction.

\textsuperscript{131} \textsc{U.C.C.} § 3-311, Official Comment 3 (1990).

\textsuperscript{132} \textsc{U.C.C.} § 3-311, Official Comment 3 (1990).

\textsuperscript{133} \textsc{U.C.C.} § 3-311(b) (1990).

\textsuperscript{134} \textsc{U.C.C.} § 3-311(a)(i) (1990).
claim is unliquidated or subject to a bona fide dispute,\textsuperscript{135} and (4) that the claimant obtained payment of the instrument.\textsuperscript{136}

Much of revised section 3-311's rule is reflected in North Carolina cases. For example, revised section 3-311's requirement of a conspicuous statement that the instrument is tendered in full satisfaction of the claim obviously goes to the issue of whether the parties did indeed agree\textsuperscript{137} to the satisfaction of the claim. If the statement is "conspicuous," defined in present Article 1 as "...so written that a reasonable person against whom it is to operate ought to have noticed it,"\textsuperscript{138} then it ought to have been written in such a way that it was seen, read and thus presumably agreed to by the person who cashed the check. Several North Carolina cases have noted the need for a clear statement of the full payment language on the checks.\textsuperscript{139} Other North Carolina cases have been very concerned with the agreement between the two parties; that concern has generally been reflected in their refusal to find an accord and satisfaction as a matter of law and the decision to send the question to the jury.\textsuperscript{140}

\begin{itemize}
\item \textsuperscript{135} U.C.C. § 3-311(a)(ii) (1990).
\item \textsuperscript{136} U.C.C. § 3-311(a)(iii) (1990). Obviously, the claimant will obtain payment when the payor bank pays the check, either because the claimant presented the check for payment to the payor bank or because the claimant initiated bank collection by taking the check to his local depository bank where he either deposited it or asked for immediate cash, but Official Comment 4 to revised section 3-311 adds that obtaining acceptance (i.e., certification at the payor bank) is also considered to be obtaining payment.
\item \textsuperscript{138} N.C. GEN. STAT. § 25-1-201(10) (1986).
\item \textsuperscript{139} See Allgood v. Wilmington Savings and Trust Co., 242 N.C. 506, 88 S.E.2d 825 (1955) (receipt upon which accord and satisfaction was claimed did not expressly state that the sum received was accepted in full settlement); Rosser v. Bynum, 168 N.C. 413, 84 S.E. 393 (1915) ("ibr. to date" not sufficiently definite or conclusive); Snow v. East, 96 N.C. App. 59, 384 S.E.2d 689 (1989), disc. rev. denied, 326 N.C. 51, 389 S.E.2d 96 (1990) (it was not clear from words, "In Full Food, Clothing, etc." that defendant intended check to cover full payment of a disputed claim). Moore v. Frazier, 63 N.C. App. 476, 305 S.E.2d 562 (1983) (the meaning of "For all claims" cannot be ascertained from the instrument itself which contains no explanatory or qualifying information).
\item \textsuperscript{140} See, e.g., Allgood v. Wilmington Sav. and Trust Co., 242 N.C. 506, 88 S.E.2d 825 (1955) (for nonsuit to be sustained on the theory of an accord and

http://scholarship.law.campbell.edu/clr/vol13/iss3/2
It is also interesting to note that revised section 3-311’s rule will bring about a discharge even if the full satisfaction language does not appear on the check itself. As long as the check is accompanied by a written communication containing a conspicuous statement that the instrument was tendered as full satisfaction of the claim, the rule will still apply. Although the cautious attorney will no doubt use both a full payment check and a letter indicating full payment, one recent North Carolina case has held that the accompanying letter with appropriate language is sufficient, and other older cases seem to back up the decision.

satisfaction, it must appear from the evidence, as the only reasonable inference deducible therefrom, that the plaintiff contracted to accept the lesser sum paid her in settlement of her claim, but evidence did not establish accord and satisfaction as a matter of law); Blanchard v. Edenton Peanut Co., 182 N.C. 20, 108 S.E. 332 (1921) (it is a question of the intent of the parties, as expressed in their acts and statements at the time, and unless, on the facts in evidence, this intent is so clear that there could be no disagreement about it among men of fair minds, the issue must be decided by the jury); Rosser v. Bynum, 168 N.C. 413, 84 S.E. 393 (1915) (question should be referred to jury as to intent); Snow v. East, 96 N.C. App. 59, 384 S.E. 2d 689 (1989), disc. rev. denied, 326 N.C. 51, 389 S.E.2d 96 (1990) (evidence tended to show that the check was full payment only for some items and not for others); Moore v. Frazier, 63 N.C. App. 476, 305 S.E.2d 562 (1983) (evidence failed to establish an unequivocal intent by either of the parties to settle plaintiff’s claim against defendant); Of course, some North Carolina cases have indeed ended with a summary judgment. See e.g., Sanyo Electric, Inc. v. Albright Distrib. Co., 76 N.C. App. 115, 331 S.E.2d 738 (1985), disc. rev. denied, 314 N.C. 668, 335 S.E.2d 496 (1985); Sharpe v. Nationwide Mutual Fire Ins. Co., 62 N.C. App. 564, 302 S.E.2d 893 (1983), cert. denied, 309 N.C. 823, 310 S.E.2d 353 (1983); Brown v. Coastal Truckways, Inc., 44 N.C. App 454, 261 S.E.2d 266 (1980).

141. U.C.C. § 3-311(b) (1990).

143. Sanyo Electric, Inc. v. Albright Distrib. Co., 76 N.C. App. 115, 331 S.E.2d 738 (1985), disc. rev. denied, 314 N.C. 668, 335 S.E.2d 496 (1985). Although the opinion does not make it clear that the accompanying letter, and not the check, included the “full, final, and complete settlement” language, the copy of the check, both back and front, in the record on appeal does make it clear.

144. Blanchard v. Edenton Peanut Co., 182 N.C. 20, 108 S.E. 332 (1921) (a concurring opinion, however, suggests that there is a difference between a check with “in full” on its face and the mere receipt of the statement of an account and the use of the check sent with it for the amount of the balance; according to the concurring opinion, the former works an estoppel absent fraud or misrepresenta-
Revised section 3-311’s rule may add something to North Carolina’s rule by requiring that the person in good faith tender an instrument to a claimant as full satisfaction of the claim. Revised Article 3 defines good faith not only as honesty in fact, the present definition applied to present Article 3, but also as “the observance of reasonable commercial standards of fair dealing.” The comment to revised section 3-311 suggests that “fair dealing” would prevent an unscrupulous insurer taking unfair advantage of a necessitous claimant by offering a full payment check that is very small in relation to the extent of the injury and the amount recoverable under the policy. It also suggests that “good faith” may prevent an accord and satisfaction when a business debtor routinely prints full satisfaction language on its check stocks and uses them in payment of its debts, whether or not there is any dispute with the creditor. This good faith requirement is obviously designed to guard against a mechanical application of the rule and prevent abuse of the rule by claimants.

Revised section 3-311’s requirement that the amount of the claim be unliquidated or subject to a bona fide dispute fits in with present North Carolina law. Several cases make the distinction between liquidated and undisputed claims which are not under the common law rule and unliquidated and disputed claims that do come in under the rule. Although N.C. GEN. STAT. § 1-540 on its face appears to provide for an accord and satisfaction even in the absence of a dispute, it has been interpreted to require a dispute or

146. U.C.C. § 3-103(a) (1990).
148. Id.
149. See, e.g., Brown v. Coastal Truckways, Inc., 44 N.C. App 454, 261 S.E.2d 266 (1980) (recognized that the full payment check rule did not apply in the case of a liquidated claim as found in Baillie Lumber Co. v. Kincaid Carolina Corp., 4 N.C. App. 342, 167 S.E.2d 85 (1969)); Sharpe v. Nationwide Mut. Fire Ins. Co., 62 N.C. App. 564, 302 S.E.2d 893 (1983), cert. denied, 309 N.C. 823, 310 S.E.2d 353 (1983) (court found that a claim on a fire insurance policy was unliquidated and under the common law rule; the insurance policy called for the actual cash value of the dwelling at the time of loss up to a maximum limit, but the actual cash value could not be resolved by a predetermined mathematical formula, and it was not agreed to prior to the date of loss).
unliquidated claim. 150

The common law rule as set out in revised section 3-311 is subject to two limitations that protect claimants. 151 Interestingly, those two limitations are themselves subject to one other limitation that protects the person against who a claim is asserted. 152

The first of the limitations to the rule applies only to claimants which are organizations, 153 and it was intended to safeguard them from inadvertent accord and satisfaction. 154 An organization, of course, must always rely on its employees or agents to do all of its work, and that work ranges from complex commercial transactions to cleaning the toilets. Every organization has a potential problem in seeing that the right work is done by the employees who are properly trained to do the work. With a full payment check, the problem is whether it will get to a person who recognizes the significance of additional language such as “full payment” on a check and who will then take the right action, such as seeing that the check is returned in order that no discharge will occur. Naturally, those organizations that regularly receive large numbers of checks (almost all of which are not full payment checks) fear that a full payment check will slip through without being noticed by clerks who are trained only to record the payment, stamp them for deposit, and send them for collection at a bank. Even clerks trained to spot full payment language may let some full payment checks slip by when overwhelmed by a large number of checks. Some organizations may not even receive their checks because they provide their customers with an address to a lock box in control of a bank which automatically records and deposits the checks without regard to any full payment language. In these cases, accord and satisfaction may occur inadvertently, and the drafters carved out the first of two limitations to the general rule to avoid an inadvertent discharge under the general rule.

Revised section 3-311(c)’s first limitation provides that if the organization, as a claimant, can prove two things, then no discharge will occur, even though the person against whom the claim is asserted can prove the four elements in revised section 3-311(a) and (b) that will ordinarily bring about a discharge. The first thing

151. U.C.C. § 3-311(c)(1), (2) (1990).
152. U.C.C. § 3-311(d) (1990).
an organization must prove is that it sent a conspicuous statement to the person against whom the claim is asserted that communications concerning disputed debts, including an instrument tendered as full satisfaction of a debt, are to be sent to a designated person, office, or place.\textsuperscript{155} The second thing that the organization must prove is that the check or any accompanying communication was not received by that designated person, office, or place.\textsuperscript{156}

The theory behind this limitation is that if an organization designates a person or its personnel in a designated office or at designated place, it will train them how to handle a full payment check. Therefore, if the person receiving the statement does comply by sending a full payment check to the appropriate person, office or place, then the organization is in a position to make a valid decision whether to accept the check in satisfaction of the debt. If the organization obtains payment of the check and does not return it, the claim is then discharged under the rule of section 3-311(a) and (b) because the organization has obviously made the decision to accept the full payment check as a satisfaction of the debt.\textsuperscript{157} If, however, the person against whom the claim is asserted does not send the check as requested by the statement to the proper person, office, or place, and the organization can prove that the check or any accompanying communication was not received by that designated person, office, or place, then the rule of revised section 3-311 will not apply to discharge the debt.\textsuperscript{158} In other words, the organization’s failure to receive the full payment check or the accompanying letter in the requested manner means that the organization was deprived of an opportunity to make a valid decision about accepting the check in satisfaction of the debt. Therefore, with no opportunity to make a decision, there can be no accord or agreement, and thus the common law rule should not apply. Any payment received by the organization from a full payment check in that case would be inadvertent and should not bring about a discharge.

An organizational claimant in a recent North Carolina Court of Appeals case, \textit{Sanyo Electric, Inc. v. Albright Distributing}
might possibly have made use of this exception and changed the result of the case. In affidavits submitted as a result of motions for summary judgment from both parties, the plaintiff said she told the defendant to send any payment to a New Jersey address and not the regular Chicago, Illinois, address, which was merely a bank lock box for receipt of payments. The defendant nevertheless sent a full payment check to the Chicago address, and the check was deposited in the claimant’s account. Naturally, the defendant asserted that the claim was therefore discharged. The Court of Appeals granted summary judgment in favor of defendant, commenting that plaintiff did not deny that the bank in Chicago was its agent, nor did it assert that the bank deposited the check either with or without authority to compromise the claim, and that the plaintiff ratified the bank’s act by not refunding the money or in any way repudiating the settlement.

The Court of Appeals’ suggestion that the claimant in *Sanyo Electric, Inc.*, could perhaps have prevented the discharge by refunding the money forms the basis of revised section 3-311’s second limitation. This limitation, unlike the first, can be used by individual claimants, as well as an organizational claimants, but it is, like the first limitation, designed to prevent inadvertent accord and satisfaction for a claimant. It provides simply that a claimant, whether an organization or an individual, may prevent a discharge under the common law rule by proving within 90 days after payment of the instrument that the claimant tendered repayment of the amount of the instrument to the person against whom the claim is asserted.

The theory behind this limitation is that it provides a period of time after the fact for the claimant to correct an inadvertent accord and satisfaction. Not all people know about the full payment rule, and they frequently find out about it only after they have cashed a full payment check and talked with an attorney about suing for the balance. Some people are probably shocked by the application of the rule because they truly had no idea that they agreed to a discharge upon cashing a full payment check. In short,
they would argue that there was no accord or agreement on their part and that a mechanical application of the rule would be unfair. This limitation obviously reflects the revising drafters' decision that in such a case no discharge should take place as long as the claimant tenders repayment of the amount of the check within 90 days to the person against whom the claim is asserted.

If, however, an organization takes the opportunity under the first limitation to send a notice that any full payment check or accompanying communication must be sent to a certain person, office, or place and actually receives the check through the designated channels, and then subsequently deposits the check, it cannot suddenly decide to cancel out the resulting discharge brought about in depositing the check by merely tendering back the money within 90 days under the second limitation. The last sentence of the second limitation provides expressly that it does not apply if the claimant is an organization that sent a statement complying with the first limitation in (1)(i).

It is quite certain that this second limitation can be subject to abuse. While it is obviously designed, as the comment suggests, to prevent inadvertent accord and satisfaction, it appears at first glance that a claimant could at one moment agree to accept a full payment check in satisfaction of a claim and then turn around and refund the money within 90 days of payment to cancel out the agreement. The limitation of revised section 3-311's subsection (d) on the two limitations in subsection (c), however, should prevent this abuse. Revised subsection (c) states specifically that it is subject to revised subsection (d). Subsection (d) in turn states that a claim is discharged if the person against whom the claim is asserted proves that within a reasonable time before collection of the instrument was initiated, the claimant knew that the instrument was tendered in full satisfaction of the claim. Thus, if the organization in subsection (c)(1) or the individual or organization in subsection (c)(2) know that the instrument was tendered in full satisfaction of the claim, then neither limitation will apply and discharge will result, even if the organization sent the notice but did not receive the check through proper channels or if the organization or individual tenders the amount of the check back within

165. Revised section 3-311 adds, "or an agent of the claimant having direct responsibility with respect to the disputed obligation."
90 days. The theory here is that if the claimant knows that the instrument was tendered in full satisfaction and obtains payment, then an agreement or accord has occurred and discharge should result, despite the two limitations.

The rule of revised section 3-311 certainly continues in existence the general common law rule already existing in numerous North Carolina decisions. It, however, adds balance to the rule by requiring good faith on the part of the person against whom a claim is asserted, by preventing inadvertent discharges on the part of the claimant, and by protecting the person against whom the claim is asserted by preventing abuse of the rule by claimants after they agree to the satisfaction. It should fit in fairly well with the present North Carolina rule and may well provide considerable relief to attorneys who can now find the rule stated in one place and not scattered among dozens of cases.

VIII. Conclusion

Many other topics in revised Article 3 remain to be discussed. Indeed, each revised section needs to be analyzed and compared to the comparable section or sections in present Article 3 in order to determine the status of the law if revised Article 3 is ever adopted. In addition, North Carolina case law under present Article 3 needs to be analyzed in the light of the revision. This Article, however, as stated earlier, is meant to provide only a preview of the revised article, and it is hoped that the reader has, from the few topics discussed, obtained at least a sense of the revision proposed by the NCCUSL and ALI in revised Article 3.

For lawyers already familiar with present Article 3, it will not be too difficult to find their way around in revised Article 3. Although many sections are numbered differently and perhaps combined with parts of several other sections, the revised article's basic organization into six "parts," is very similar to that of present Article 3, and the catch lines of the revised sections, together with the Official Comments and Table of Disposition, provide many helpful guideposts. Of course, having a prior, working knowledge of present Article 3 is of great advantage because it helps in figuring out the meaning and intent of revised Article 3. The biggest fear, even for the lawyer knowledgeable about present Article 3, however, is that the rewriting of the sections, particularly substituting

a new term or phrase for an old and familiar one, will in some unexpected way change the law.

For those lawyers who know their way only hesitatingly through present Article 3 and who cannot call on their knowledge of present Article 3 to help in working with the revised Article 3, the going will be much tougher. Only careful study of the article itself and the legal literature about it, coupled with continuing legal education seminars, will likely provide much help.

Despite the adverse effects brought about when any area of the law undergoes a major revision and modernization, revised Article 3, or some revision similar to it, will probably be adopted eventually here in North Carolina and across the country. Present Article 3 has no doubt aged and needs revision, and though it might sound attractive to the practicing bar, patching up present Article 3 will probably not do the job adequately. Now that the NCCUSL and the ALI has proposed revised Article 3, it will no doubt be examined intensely in the coming year, not only in North Carolina but also, as befits a very important uniform law, in every state across the nation. Hopefully, no state will reject revised Article 3 merely because of its extensive revision of present Article 3. Instead, each state should carefully examine the provisions of revised Article 3 for their own merit or deficiency and then balance those against the merits and deficiencies of present Article 3 to come up with a revised negotiable instruments law, whether it is the NCCUSL and the ALI’s proposed revised Article 3 or some version of it.